has become so attenuated as to dissipate the taint. *United States v. Ceccolini*, 435 U.S. 268, 273 (1979).[5]

Whether a confession must be suppressed as a result of illegal police conduct depends on whether the confession was "sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). The appropriate question is, "[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 487-88.

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[5] Prior to the Court of Criminal Appeals' decision in petitioner's case, neither the federal nor the state appellate courts had distinguished a causal connection analysis from an attenuation of the taint analysis. *See, e.g., United States v. Johnson*, 626 F.2d 753, 758 (9th Cir. 1980) ("The attenuation which we analyze is the degree of causal remoteness between the illegal detention and the evidence obtained from the defendant."); *United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir. 1990); *United States v. Green*, 111 F.3d 515, 521 (7th Cir. 1997) ("Evidence may be sufficiently distinguishable to be purged of the primary taint if the causal connection between [the] illegal police conduct and the procurement of [the] evidence is so attenuated as to dissipate the taint of the illegal action."); *United States v. Caro*, 248 F.3d 1240, 1247 (10th Cir. 2001) ("To satisfy this burden, the government must prove, from the totality of the circumstances, a sufficient attenuation or break in the causal connection between the illegal detention and the consent."); *Hornsby v. State*, 517 So.2d 631, 638 (Ala. Crim. App. 1978) (causal connection may become so attenuated as to dissipate taint of illegal conduct); *State v. Thpply*, 470 A.2d 900, 905 (N.H. 1983) ("Because of his illegal detention any statements made by him during such period must be excluded unless the State shows that there has been a sufficient attenuation of the original taint to remove the causal connection between the illegal custody and the statements."); *State v. Garcia*, 123 S.W.3d 335, 346 (Tenn. 2003) (addressing whether causal connection between illegal police conduct and discovery of evidence has been sufficiently attenuated).

In *Brown v. Illinois*, 422 U.S. 590 (1975), this Court set forth the factors that determine whether there has been sufficient attenuation to dissipate the taint. Most importantly, for present purposes, it placed the burden on the prosecution, as the proponent of the evidence, to prove that the causal connection between the illegal police conduct and the confession was broken sufficiently to purge the primary taint of th t conduct. *Id.* at 604. It concluded that the prosecution "failed to sustain the burden of showing that the evidence in question was admissible under *Wong Sun*." *Id.* This Court reaffirmed the principle in *Dunaway v. New York*, 442 U.S. 200 (1979), concluding that no intervening events of significance broke the connection between the illegal detention and the confession. The *Dunaway* court repeatedly emphasized that the causal connection is "the relevant inquiry in making the attenuation determination." *United States v. Johnson*, 626 F.2d at 758. This Court has never imposed a burden on the defendant to prove a causal connection between the illegal police conduct and the confession.

Petitioner's case is conceptually similar to *Brown v. Illinois*. The police illegally arrested Brown, gave him the *Miranda* warnings,[4] and he confessed. The issue was whether giving the *Miranda* warnings sufficiently attenuated the taint of the illegal arrest. *Brown*, 422 U.S. at 591-92. The Court described the *Miranda* warnings as a "prophylactic rule" and a "procedural safeguard" employed to protect Fifth Amendment rights against "the compulsion inherent in custodial surroundings." *Id.* at 605. The

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

function of the warnings "relates to the Fifth Amendment's guarantee against coerced self-incrimination," and the exclusion of a confession made in the absence of the warnings is intended to deter illegal police conduct. *Id.* at 600-01.

The Texas parental notification provision expresses a legislative acknowledgement that a juvenile in police custody lacks the experience and maturity to make an informed decision to submit to interrogation in the absence of advice from an interested adult. The Court of Criminal Appeals has recognized that, when a juvenile is in custody, the police must strictly comply with the requirements of the Texas Family Code. *See Comer v. State*, 776 S.W. 2d 191, 194 (Tex. Crim. App. 1989); *Le v. State*, 993 S.W.2d 650, 655 (Tex. Crim. App. 1999). That court observed, in a different context, that these provisions are intended, in part, to "insulat[e] these children from the stigma of criminality and provid[e] for their welfare and edification – and to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety. . . ." *Comer*, 776 S.W.2d at 193. These provisions reflect "the Legislature's clear intent to reduce an officer's impact on a juvenile in custody." *Le*, 993 S.W.2d at 655.

Like the *Miranda* warnings, the parental notification provision constitutes a "prophylactic rule" and a "procedural safeguard" employed to protect a juvenile's Fifth Amendment rights against the compulsion inherent in custodial surroundings. The failure of the police to comply with the parental notification provision rendered petitioner's detention illegal for purposes of interrogating him and failed to effectuate his Fifth Amendment rights. The

Court of Criminal Appeals agreed that the police conduct was illegal. This Court has placed the burden on the prosecution to prove that a confession obtained following illegal police conduct is sufficiently attenuated to be admissible. *Brown*, 422 U.S. at 604. The decision of the Court of Criminal Appeals that distinguishes a causal connection analysis from an attenuation of the taint analysis and places the burden on a juvenile to prove that illegal police conduct caused him to confess is contrary to this Court's jurisprudence.

This Court should grant certiorari to determine whether a juvenile has the burden to prove that illegal police conduct caused him to confess before the prosecution must prove attenuation of the taint, an important federal question that the Court of Criminal Appeals decided in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c). Moreover, because the decision of the Court of Criminal Appeals is clearly erroneous, summary reversal is warranted. This Court should vacate the judgment and remand for the Court of Criminal Appeals to determine whether the State can prove attenuation of the taint based on the factors set forth in *Brown v. Illinois*.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari and summarily reverse the judgment of the Court of Criminal Appeals or, in the alternative, order briefing and oral argument.

Respectfully submitted,

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Court of Criminal Appeals of Texas.

John Tuy PHAM and Chance Derrick Gonzales, Appellants,

v.

The STATE of Texas.

Nos. PD-12-04, PD-72-04.

June 8, 2005.

MEYERS, J., delivered the opinion of the Court, in which KELLER, P.J., and PRICE, WOMACK, JOHNSON, HERVEY, HOLCOMB, and COCHRAN, JJ., join. KEASLER, J., filed a dissenting opinion.

OPINION

MEYERS, J.

Appellant John Tuy Pham was convicted by a jury of the offense of murder, and was assessed a punishment of life imprisonment in the TDCJ Institutional Division. Appellant Chance Derrick Gonzales pled guilty to the offense of murder in the 208th District Court of Harris County, Texas. He was sentenced to 45 years' confinement in the Texas Department of Criminal Justice ("TDCJ") institutional division pursuant to a plea bargain.

We consolidated Appellants' cases, as the same issues are raised in each of their appeals, and both cases are being appealed from the First Court of Appeals in Harris County. We will affirm the judgment of the court of appeals in both cases.

I. Facts

Appellant Pham was sixteen years old at the time he became a suspect in the drive-by shooting that resulted in

the death of the victim, Dung Van Ha. At 2:35 p.m. on September 9, 1998, Houston police officers arrested Appellant at Clear Brook High School. At 3:35 p.m., a magistrate gave Appellant legal warnings as required by section 51.095 of the Texas Family Code. Subsequently, Appellant was taken to the police station and questioned by an investigator. Appellant admitted to his involvement in the shooting at approximately 4:38 p.m. He was then taken to a juvenile facility for processing by the police officers. An officer from this processing facility first notified Appellant's family at about 8:15 p.m. when he spoke to Appellant's sister. No one from the police department spoke with Appellant's parents until 9:50 p.m. Appellant's parents did not come to see him until the following day.

Appellant Gonzales was arrested in connection with a shooting death during a robbery at a convenience store when he was 15 years old. Appellant was identified by two witnesses who confirmed that he shot the victim while attempting to steal beer from the store for a gang party. Police arrested Appellant at a party, sometime between midnight and 1:30 a.m. Before police officers took Gonzales to a juvenile processing office at approximately 2:30 a.m., the officers made a stop at a sheriff's station where they left him for 20-30 minutes so they could pick up a surveillance tape from a convenience store. This tape showed Appellant committing a similar type of robbery the same night. Appellant was given his *Miranda* warnings in the car on the way to the processing facility. The officer's then took Appellant to a municipal judge at 3:35 a.m., where he was given the warnings required by Texas Family Code section 51.095. It was in the judge's chambers with the police officers that Appellant Gonzales then gave his written statement. The arresting officer testified that

he did not notify Appellant's parents that their son had been arrested. Appellant Gonzales' parents did not know that he had been arrested until he was processed into the juvenile arresting facility five to six hours after he was arrested, and after he gave his statement to police.

II. Procedural History: Pham

Appellant Pham originally appealed his conviction to the First Court of Appeals. The court of appeals in *Pham v. State*[1] (*Pham I*), reversed the conviction based on the conclusion that the trial court erred in admitting Appellant's statement. The court held the statement inadmissible due to the State's violation of Texas Family Code § 52.02(b)[2], and remanded the case to the trial court. The State subsequently filed a petition for discretionary review with this court, which was granted. This court vacated *Pham I* in *Pham v. State*[3] (*Pham II*), and remanded the case to the court of appeals in light of the decision in *Gonzales v. State* (*Gonzales II*).[4] Upon reconsideration, the

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[1] *John Tuy Pham v. State*, 36 S.W.3d 199 (Tex.App.-Houston [1st Dist.] 2000).

[2] Texas Family Code section 52.02(b) states:
A person taking a child into custody shall *promptly* give notice of the person's action and a statement of the reason for taking the child into custody, to:

(1) the child's parent, guardian, or custodian; and (2) the office or official designated by the juvenile board. (*emphasis added*)

[3] *Pham v. State*, 72 S.W.3d 346 (Tex.Crim.App.2002).

[4] *Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App.2002) (*Gonzales II*).

court of appeals decided *Pham v. State* (*Pham III*)[5], on November 26, 2003. In this decision, the court held that the trial court had properly admitted Appellant's confession, and that Appellant was not entitled to a jury instruction on the admissibility of his confession. Appellant subsequently filed a petition for discretionary review to this Court.

III. Procedural History: Gonzales

Appellant Gonzales appealed to the First Court of Appeals from a plea of guilty. The court of appeals handed down its original decision (*Gonzales I*) on November 4, 1999, holding that Appellant's confession was inadmissible because the State had not met its burden of proving that Texas Family Code § 52.02(b) had not been violated.[6] We granted the State's petition for discretionary review, and on February 13, 2002, vacated the decision of the court of appeals (*Gonzales II*). This Court held in *Gonzales II* that Appellant's statement was not inadmissible merely because the State failed to follow the requirements of Texas Family Code § 52.02(b). We held that an exclusionary analysis under Texas Code of Criminal Procedure Article 38.23, including a causal connection analysis, had to be undertaken by the court, and had not been.[7] Therefore the case was remanded. Upon reconsideration of the case, the court of appeals handed down an opinion on November 26,

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[5] *Pham v. State*, 125 S.W.3d 622 (Tex.App.-Houston [1st Dist.] 2003) (*Pham III*).

[6] *Gonzales v. State*, 9 S.W.3d 267 (Tex.App.-Houston [1st Dist.] 1999) (*Gonzales I*).

[7] *Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App.2002).

2003 (*Gonzales III*),[8] holding that, in an article 38.23 exclusionary analysis, the initial burden was on the appellant to demonstrate a violation of a statutory requirement as well as a causal connection between the violation and his ensuing confession.[9] Finding that Appellant Gonzales presented no evidence to demonstrate this causal connection, the court of appeals affirmed the judgment of the trial court and held Appellant's statement admissible.[10] Appellant then filed a petition for discretionary review with this Court.

IV. First Court of Appeals' Decisions and Grounds for Review

The court of appeals held in *Pham III* that the State did obtain Appellant Pham's confession in violation of Texas Family Code section 52.02(b), however, in light of our opinion in *Gonzales II*, the court also held that the confession was not automatically inadmissible without first conducting an analysis under Texas Code of Criminal Procedure article 38.23 to determine whether there was a causal connection between the illegal conduct and the acquisition of the evidence.[11] The court of appeals interpreted our remand in *Gonzales II* as implying that an attenuation-of-taint analysis was an insufficient analysis to satisfy the requirement that a causal connection be established. Therefore the court of appeals determined that the causal connection analysis required by this Court

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[8] *Gonzales v. State*, 125 S.W.3d 616 (Tex.App.-Houston [1st Dist.] 2003) (*Gonzales III*).

[9] *Id.* at 618.

[10] *Id.* at 619.

[11] *Pham III* at 625.

in *Gonzales II* must be separate from an attenuation-of-taint analysis.[12] The court of appeals further relied on our opinion in *Roquemore v. State*, 60 S.W.3d 862 (Tex.Crim.App.2001) for this conclusion, where this Court first conducted a causal connection analysis and found a causal connection between the recovery of stolen property and the illegality of police conduct, but failed to conduct an attenuation-of-taint analysis because the State did not raise the argument.[13]

The court of appeals next addressed the issue of which party has the burden of proving a causal connection, noting that no direct authority establishes who takes on this burden.[14] The court pointed out that the issue is not who has the ultimate burden of persuasion as to the admissibility of a confession, as this clearly rests with the State in an attenuation-of-taint analysis, but rather who has the initial burden of production of proof of a causal connection between the violation of the statute and the ensuing confession. The court ultimately held that the defendant should shoulder this initial burden of proof, analogizing the situation to that of a violation of the statute requiring that a defendant promptly be taken before a magistrate. The court also based its conclusion upon more practical considerations, such as the fact that it is more "reasonable to place the burden on the defendant to produce evidence to which only the defendant has access."[15] The court concluded that the State has the burden to demonstrate attenuation of the taint once the

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[12] *Id.*

[13] *Id.*

[14] *Id.* at 626.

[15] *Id.* at 627.

defendant has satisfied the initial burden of production of some evidence that shows a causal connection between the police illegality and the recovery of the evidence.[18] The court found that Appellant Pham produced no evidence of a causal connection, and therefore did not meet his burden, making it unnecessary to conduct an attenuation-of-taint analysis, and rendering his confession admissible.

In Appellant Gonzales' case, the court of appeals, citing its decision in *Pham III* (discussed above), again held that when there is a violation of section 52.02(b) of the Texas Family Code, the initial burden is on the defendant to demonstrate a violation of the statutory requirement and a causal connection between that violation and the ensuing confession. Again, the court held that Appellant Gonzales produced no evidence that would demonstrate a causal connection between the police violation of the Family Code and his ensuing confession, therefore his statement was admissible.

Both Appellants argue that a causal-connection analysis is part and parcel of an attenuation-of-taint analysis, and that the burden of proof falls on the State to negate the causal connection between the violation and the confessions of the two Appellants. Appellants claim that the court of appeals ignored cases stating that when voluntariness is an issue, the burden of proof for admissibility of confessions lies with the State, and argue that this Court did not create a separate causal connection analysis in *Gonzales II*.

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[18] *Id.*

The State argues in these cases that the court of appeals did not err in placing the burden of *production* on Appellants to offer evidence to prove that violations of the Family Code occurred, and that they were causally connected to the ensuing confessions. The State contends that Appellants failed to meet the burden of production, i.e. they did not produce any evidence that their statements were obtained in violation of any laws. Additionally, the State argues that causal connection and attenuation-of-taint are two separate analyses by which a court will determine whether evidence was obtained in violation of the law as set out in article 38.23.

We granted review in both of these cases to clarify the causal connection analysis which must be undertaken in article 38.23 suppression of evidence claims. In Appellant Pham's case, we granted the following two grounds for review: 1) did the court of appeals err in holding that causal connection and attenuation-of-taint constitute separate analyses, and 2) did the court of appeals err by requiring Appellant to prove a causal connection between the violation of section 52.02(b) of the Texas Family Code and Appellant's confession? In Appellant Gonzales' case, we granted the following ground for review: did the court of appeals adopt the wrong standard by which a causal connection must be established under article 38.23 to justify suppression of evidence seized in violation of the Family Code?

IV.[sic] Law

Neither party argues with the settled law that the burden of proof is initially on the defendant to raise the exclusionary issue by producing evidence of a statutory

violation, and that this burden then shifts to the State to prove compliance. The main issue we face here is whether the defendant has the burden of producing evidence that shows the violation is connected to the obtaining of the evidence sought to be suppressed.

Appellants argue that a causal connection analysis cannot be separated from an attenuation analysis, and thus, since it is well settled that the State bears the burden of proving attenuation of taint, the burden is also upon it to produce evidence of a causal connection. We disagree. If we follow this circular argument, anytime an appellant asserted a statutory violation of Family Code section 52.02(b), a court would immediately have to conduct an attenuation-of-taint analysis because it is part of the causal connection analysis. This would further the assumption that once Appellant shows a violation of the statute under 52.02(b), the evidence is automatically assumed inadmissible unless the State demonstrates attenuation-of-taint, an assumption which we expressly rejected in *Gonzales II*.

We have held that the State may make an attenuation-of-taint argument which is included under an Article 38.23 analysis.[17] However, this argument is discussed by a court only if the State raises it.[18] Analysis of causal connection and attenuation-of-taint are not the same. An attenuation-of-taint analysis is not always required and therefore need not always be conducted. We have expressly held that a causal connection between a violation of section 52.02(b) and the obtaining of evidence *must be*

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[17] *Johnson v. State*, 871 S.W.2d 744 (Tex.Crim.App.1994).

[18] *Roquemore v. State*, 60 S.W.3d 862 (Tex.Crim.App.2001).

shown before the evidence is rendered inadmissible.[19] If there is no causal connection shown in the first place, there is no reason for the State to argue that the taint of the violation is so far removed that the causal connection is broken. Attenuation-of-taint breaks this connection. It does not negate the existence of the causal connection.

If the defendant produces evidence that there is a causal connection, the State may either try to disprove this causal evidence, i.e. disproving that there is a causal connection in existence at all, or, the State may make an attenuation-of-taint argument. Attenuation-of-taint is evaluated under the four-step *Brown v. Illinois*[20] analysis, in which the State may argue that although the defendant has demonstrated evidence of a causal connection, the taint of the violation was so far removed from the obtaining of the evidence that the causal chain the defendant demonstrated is in fact broken. In short, without first establishing that there is a causal connection between the violation and the obtaining of the evidence, there can be nothing for the State to assert has been broken through the attenuation-of-taint factors. Thus, we uphold the court of appeals' conclusion that a causal connection analysis regarding Family Code section 52.02(b), as required by this Court in *Gonzales II* before evidence may be deemed inadmissible, is separate from an attenuation-of-taint analysis, which may be used by the State to rebut a defendant's causal connection argument.

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[19] *Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App.2002) (*Gonzales II*).

[20] *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

We also uphold the court of appeals' distribution of the burdens of proof in both of these cases. We have long held that "the burden of persuasion is properly and permanently placed upon the shoulders of the moving party. When a criminal defendant claims the right to protection under an exclusionary rule of evidence, it is his task to prove his case."[21] In *Russell v. State*, we again cited this holding. Recognizing that this analysis was used for federal claims of illegal search and seizure under the Fourth Amendment, and because Texas statutory law is silent as to how the burden of proof is distributed on a motion to suppress, this Court adopted some of the rules followed by federal courts in distributing burdens of proof.[22]

Appellant argues that the burden should be on the State to show the causal connection, and analogizes this situation to the admissibility of confessions when issues of voluntariness are raised. Although the burden is on the State to prove that a defendant's confession was voluntary once the issue has been raised, that situation may be distinguished from the statutory violation of the Texas Family Code we have here. All a defendant must do on a claim of involuntary confession is to demonstrate there is a cognizable violation, and the confession is immediately presumed inadmissible unless the State can prove by a preponderance of the evidence that it was made voluntarily.[23] There is no requirement that a defendant establish

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[21] *Mattei v. State*, 455 S.W.2d 761, 766 (Tex.Crim.App.1970) (quoting *Rogers v. United States*, 330 F.2d 535 (5th Cir.1964), *cert. denied*, 379 U.S. 916, 85 S.Ct. 265, 13 L.Ed.2d 186 (1964)).

[22] *Russell v. State*, 717 S.W.2d 7, 9 (Tex.Crim.App.1986).

[23] *United States v. Reynolds*, 367 F.3d 294 (5th Cir.2004).

any causal connection between the illegal conduct and the ensuing confession; the defendant simply must raise the voluntariness issue. In this case, it is not enough for the defendant to merely establish a violation. Under Texas case law, it is required that a causal connection be established, and we hold that the defendant, as the moving party wishing to exclude the evidence, is responsible for the burden of proving this connection.

Thus, the court of appeals correctly held that the burden is on the defendant, as the moving party in a motion to suppress evidence obtained in violation of the law under Art. 38.23, to produce evidence demonstrating the causal connection which this court required in *Gonzales II*. The burden then shifts to the State to either disprove the evidence the defendant has produced, or bring an attenuation-of-taint argument to demonstrate that the causal chain asserted by the defendant was in fact broken.

V.[sic] Conclusion

In the case of Appellant Pham, we hold that the court of appeals conducted the appropriate analysis, and that the court did not err in requiring Appellant Pham to produce evidence to prove a causal connection between the violation of section 52.02(b) of the Texas Family Code and his ensuing confession. The decision of the court of appeals is affirmed.

In the case of Appellant Gonzales, we hold that the court of appeals adopted the correct standard by which a causal connection must be established under Art. 38.23 to justify the suppression of evidence seized in violation of the Family Code. The decision of the court of appeals is affirmed.

KEASLER, J., filed a dissenting opinion.

The Court concludes that an attenuation-of-taint analysis is different from a causal-connection analysis. Because the only support for this conclusion is a troublesome substantive footnote, and the conclusion is in conflict with Supreme Court jurisprudence, I dissent.

The United States Supreme Court introduced the attenuation concept over 65 years ago in *Nardone v. United States.*[1] There the Court explained that "[s]ophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof," but "[a]s a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint."[2] In other words, an analysis of the "causal connection" between the violation of the law and the discovery of the evidence is part and parcel of the "attenuation of taint" analysis. They are one and the same. If the evidence is obtained as a direct result of the illegal action, then there is a causal connection between the two. If the discovery of evidence is a remote result of the illegal action, then there is an attenuation of the taint. The two events are either causally connected or they are attenuated. The doctrines are two sides of the same coin.

We recognized this in *Bell v. State*[3] when we addressed the "taint attenuation to determine whether the causal chain between the illegal arrest/first confession and subsequent events was broken." Later, in *State v.*

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[1] 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (U.S. 1939).

[2] *Id.* at 341, 60 S.Ct. 266.

[3] 724 S.W.2d 780, 791 (Tex.Crim.App.1986).

Daugherty,[4] we discussed "what Article 38.23(a) means by 'evidence obtained in violation of' the law."[5] We explained that the "ordinary meaning" of "obtained" accommodated the attenuation doctrine because "depending on how removed the actual attainment of the evidence is from the illegality, the ordinary person would not consider that evidence to have been 'obtained' by that illegality."[6] Even when evidence would not have been obtained but for an illegality, we said, if the eventual discovery of the evidence was far removed from the illegality then the evidence would not need to be excluded "because the ordinary meaning of 'obtained' does not extend to such a remote, or 'attenuated,' causal relationship."[7] So we, too, have recognized that the attenuation doctrine encompasses a causal connection analysis.

But a few years ago in *Roquemore v. State*,[8] we dropped a mischievous footnote. After analyzing whether there was a causal connection between the illegality and the discovery of the evidence, we then said that "we need not do an attenuation of taint analysis because the State did not raise the argument."[9] With this footnote, we implied that an attenuation analysis is separate from a causal-connection analysis. This is not true, of course, and the footnote itself is dicta,[10] but those facts have not

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[4] 931 S.W.2d 268 (Tex.Crim.App.1996).

[5] *Id.* at 269.

[6] *Id.* at 270.

[7] *Id.*

[8] 60 S.W.3d 862 (Tex.Crim.App.2001).

[9] *Id.* at 875 n. 14.

[10] *See Young v. State*, 826 S.W.2d 141, 156 n. 5 (Tex.Crim.App.1991).

stopped this footnote from having a negative impact on the law.

The footnote has certainly confused the First Court of Appeals. On original submission in *Pham*, the First Court analyzed whether there was a causal connection between the illegality and the discovery of evidence, and the court concluded that there was. The court said the following:

> If the arresting officers had promptly notified appellant's parents of his arrest approximately two hours before his confession, there would have been time for them to get to the juvenile processing office at 1200 Travis before the confession. As in *Comer*,[11] we cannot say with any degree of confidence that if appellant had access to his parents or his attorney, he would still have chosen to confess to the crime.[12]

Despite the court's analysis, we granted the State's petition and remanded the case for the Court of Appeals to consider the issue again in light of *Gonzales*.[13] The First Court was somewhat perplexed, saying:

> In our original opinion, we conducted a taint-attenuation analysis, tracking *Comer*. This was apparently an insufficient analysis to avoid a remand for reconsideration in light of *Gonzales*.[14]

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[11] *Comer v. State*, 776 S.W.2d 191 (Tex.Crim.App.1989).

[12] *Pham v. State*, 36 S.W.3d 199, 204-05 (Tex.App.-Houston [1st Dist.] 2000) (*Pham I*).

[13] *Pham v. State*, 72 S.W.3d 346 (Tex.Crim.App.2002) (*Pham II*), *citing Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App.2002).

[14] *Pham v. State*, 125 S.W.3d 622 (Tex.App.-Houston [1st Dist.] 2003) (*Pham III*) (internal citations omitted).

The court determined from our remand that, "at the outset," it should "determine whether causal connection and attenuation of the taint constitute separate analyses."[15] It then found that the case "most clearly demonstrating separate analyses for causal connection and attenuation of the taint, and the order in which they are to be undertaken, is *Roquemore*."[16] The court concluded that, "[b]ased on *Roquemore*, and based on the fact that our attenuation-of-the-taint analysis in *Pham I* was found inadequate to satisfy a *Gonzales* causal-connection analysis, we conclude that there are separate analyses for causal connection and attenuation of the taint."[17]

But the footnote in *Roquemore* was misguided and misleading. Additionally, a remand from this Court in light of another case does not necessarily mean that the appellate court was wrong in its original analysis. It means only that we want the court to consider the issue again and determine if its analysis needs to be altered in light of the new opinion. In this case, there was no need for the Court of Appeals to alter its analysis in *Pham I*. It had already done an attenuation/causal connection analysis, which is all that *Gonzales* required.

In other jurisdictions, it is a given that an attenuation-of-the-taint analysis and a causal-connection analysis are one and the same. The United States Court of Appeals for the Tenth Circuit says that "the government must prove, from the totality of the circumstances, a sufficient attenuation or break in the causal connection between the

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[15] *Id.* at 625.

[16] *Id.*

[17] *Id.* at 625-26.

illegal detention and the consent."[18] The Eleventh Circuit says that "challenged evidence will be admissible under the 'attenuation' doctrine if the causal connection between the constitutional violation and the discovery of the evidence has become so attenuated as to dissipate the taint."[19] The Fifth Circuit refers to the analysis as the "causal-taint attenuation" analysis.[20] State courts have held similarly.[21]

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[18] *United States v. Caro*, 248 F.3d 1240, 1247 (10th Cir.2001).

[19] *United States v. Terzado-Madruga*, 897 F.2d 1099, 1113 (11th Cir.1990).

[20] *United States v. Causey*, 818 F.2d 354, 361 (5th Cir.1987), *rev'd on other grounds*, 834 F.2d 1179 (5th Cir.1987). *See also United States v. Wipf*, 397 F.3d 677, 684 (8th Cir.2005) ("challenged evidence derived through police illegality will still be admissible under the 'attenuation' doctrine of the causal connection between the constitutional violation and the discovery of the evidence has become so attenuated as to dissipate the taint"); *United States v. Green*, 111 F.3d 515, 521 (7th Cir.1997) ("[e]vidence may be 'sufficiently distinguishable to be purged of the primary taint' if 'the causal connection between the illegal police conduct and the procurement of the evidence is "so attenuated as to dissipate the taint' of the illegal action" '"); *United States v. Johnson*, 626 F.2d 753, 758 (9th Cir.1980) (stating that "majority opinion in *Dunaway* repeatedly emphasizes that it is the 'causal connection' that is the relevant inquiry in making the attenuation determination").

[21] *See, e.g., Hornsby v. State*, 517 So.2d 631, 638 (Ala.Crim.App., 1987) (causal connection may become so attenuated as to dissipate the taint); *State v. Tapply*, 124 N.H. 318, 326, 470 A.2d 900 (N.H.1983) ("Because of his illegal detention, any statements made by him during such period must be excluded unless the State shows that there has been a sufficient attenuation of the original taint to remove the causal connection between the illegal custody and the statements."); *State v. Barry*, 86 N.J. 80, 94, 429 A.2d 581 (N.J.1981) ("By focusing on 'the causal connection between the illegality and the confession,' the attenuation doctrine serves to indicate when exclusion is necessary to further the purpose of deterrence."); *State v. Garcia*, 123 S.W.3d 335, 346 (Tenn.2003) (addressing "whether the causal connection between an unlawful seizure and a subsequent consent has been broken, i.e.

(Continued on following page)

Once we acknowledge that the attenuation analysis and the causal-connection analysis are one and the same, the question regarding burden of proof is answered. In *Brown v. Illinois*, the United States Supreme Court set forth some of the factors to be considered in a causal connection/attenuation analysis, then added that "the burden of showing admissibility rests, of course, on the prosecution."[22] We have also recognized that "the burden of showing attenuation and thus admissibility rests with the prosecution."[23]

In both *Pham* and *Gonzales*, the appellate court erred in analyzing the causal connection separately from the attenuation of the taint. The court also erred in placing the burden of showing a causal connection on the appellants. I would reverse both judgments. Because the majority holds otherwise, I dissent.

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whether the primary taint of an unlawful seizure has been sufficiently attenuated").

[22] 422 U.S. 590, 603-604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). *See also Dunaway v. New York*, 442 U.S. 200, 218, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

[23] *Boyle v. State*, 820 S.W.2d 122, 131 (Tex.Crim.App.1989).

Court of Appeals of Texas,
Houston (1st Dist.).

John Tuy PHAM, Appellant,
v.
The STATE of Texas, Appellee.

No. 01-99-00631-CR.
Nov. 26, 2003.

Discretionary Review Granted Sept. 15, 2004.

EN BANC OPINION ON REMAND FROM THE COURT OF CRIMINAL APPEALS

TIM TAFT, Justice.

A jury found appellant, John Tuy Pham, guilty of murder and assessed punishment at life in prison. This Court reversed the conviction because the trial court had erred in admitting appellant's confession. *Pham v. State,* 36 S.W.3d 199 (Tex.App.-Houston [1st Dist.] 2000) (*Pham I*). On petition for discretionary review, the Court of Criminal Appeals vacated our judgment and remanded the cause for reconsideration in light of *Gonzales v. State,* 67 S.W.3d 910 (Tex.Crim.App.2002). *Pham v. State,* 72 S.W.3d 346 (Tex.Crim.App.2002) (*Pham II*). We apply *Gonzales* by considering whether there was a causal connection between (1) the failure to notify appellant's parents of his custody and whereabouts and (2) the acquisition of appellant's confession. We also address (1) whether appellant preserved his complaint that the trial court should have suppressed his oral statement because he was not taken to a juvenile processing office without unnecessary delay; (2) whether the trial court reversibly erred in refusing appellant's requested jury instructions regarding the admissibility of appellant's illegally taken oral confession; and (3) whether the trial court abused its discretion in excluding

expert testimony regarding the impact or desirability of probation versus incarceration. We affirm.

Facts

Appellant was a 16-year-old high school junior when he became a suspect in a drive-by shooting that had resulted in the death of the complainant, Dung Van Ha. Houston Police Department officers went to appellant's school and took him into custody about 2:35 p.m. The officers were told by a school security guard that the principal would contact appellant's family and that the guard himself would contact appellant's brother. The officers took appellant to be warned by a magistrate about 3:35 p.m. Appellant was then taken to the downtown police station and questioned by an investigator. About 4:38 p.m., appellant admitted having fired a .45-caliber weapon at the car that the complainant was driving. The officers who had taken appellant into custody then took appellant to a juvenile facility [sic] be processed, fingerprinted, and photographed.

The first notification of appellant's family was made by an officer at the juvenile processing facility. The officer spoke to appellant's sister around 8:15 p.m. Someone from the Juvenile Probation Department contacted appellant's father about 9:50 p.m. It was not until the following day that appellant's parents went to see appellant and found out why he had been taken into custody.

Requirement of Causal Connection Between Failure to Notify Parents and Child's Ensuing Confession

In his first and second points of error, appellant contends that his confession should have been suppressed pursuant to article 38.23 of the Code of Criminal Procedure (the Texas statutory exclusionary rule) because the police did not comply with section 52.02(b) of the Family Code. *See* Tex.Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp.2004); Tex. Fam.Code Ann. § 52.02(b) (Vernon Supp.2004). Section 52.02(b) requires that a person taking a child into custody promptly give notice of the person's action, and a statement of the reason for taking the child into custody, to the child's parent, guardian, or custodian and to the office or official designated by the juvenile board. Tex. Fam.Code Ann. § 52.02(b). Appellant's complaint focuses on the failure to notify his parents promptly.

In *Pham I*, we held that the officers failed to notify appellant's parents promptly. *Id.*, 36 S.W.3d at 203-04. A juvenile's written statement obtained after a violation of section 52.02(b) of the Family Code is not automatically inadmissible, however. *See Gonzales*, 67 S.W.3d at 912-13. If evidence obtained in violation of the Family Code is to be excluded, article 38.23 of the Code of Criminal Procedure is the proper mechanism for exclusion. *Id.* Article 38.23(a) provides that "[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas . . . shall be admitted in evidence. . . ." Tex.Code Crim. Proc. Ann. art. 38.23(a). Evidence is not obtained in violation of a provision of law if there is no causal connection between the illegal conduct and the acquisition of evidence. *Gonzales*, 67 S.W.3d at 912. Therefore, in light of article 38.23(a), before a

juvenile's written statement can be excluded, there must be a causal connection between the violation of section 52.02(b) and the making of the statement. *See id.*

In our original opinion, we conducted a taint-attenuation analysis, tracking *Comer v. State*, 776 S.W.2d 191 (Tex.Crim.App.1989). *See Pham I*, 36 S.W.3d at 204-05. This was apparently an insufficient analysis to avoid a remand for reconsideration in light of *Gonzales*. Therefore, at the outset, we determine whether causal connection and attenuation of the taint constitute separate analyses.

A. Whether Causal Connection and Attenuation of the Taint Involve Separate Analyses

The case most clearly demonstrating separate analyses for causal connection and attenuation of the taint, and the order in which they are to be undertaken, is *Roquemore v. State*, 60 S.W.3d 862 (Tex.Crim.App.2001). In *Roquemore*, the Court of Criminal Appeals first found a causal connection between the recovery of the stolen property and the illegality of the police conduct. *Id.* at 871. The Court found it unnecessary, however, to proceed to an attenuation-of-the-taint analysis because the State did not raise the argument. *Id.* at n. 14.

Based on *Roquemore*, and based on the fact that our attenuation-of-the-taint analysis in *Pham I* was found inadequate to satisfy a *Gonzales* causal-connection analysis, we conclude that there are separate analyses for causal connection and attenuation of the taint. Based on *Roquemore*, we also conclude that the causal-connection analysis precedes the attenuation-of-the-taint analysis. We next determine who has the burden in a causal-connection analysis.

B. Who Has the Burden

1. Causal connection

No direct authority establishes who has the burden of proving a causal connection between a Family Code violation and a juvenile defendant's statement. The Court of Criminal Appeals has directed us to conduct a causal-connection analysis, but has not set out whether the State or the defendant has the burden of proof. Not surprisingly, both parties have argued that the other party should have the burden.

Appellant argues that the burden of disproving a causal connection lies with the State. Appellant relies on (1) an analogy to how the burden shifts to the State to show compliance with a statute once the accused has raised some evidence of a violation; (2) an analogy to the State's ultimate burden of proving that the voluntariness of a confession; and (3) a commentator's observation that *Gonzales* recognized with approval a statement from *Comer* that appeared to conclude that the evidence failed to show the lack of a causal connection between the statutory violation and the making of the statement. We agree with appellant that, once a defendant raises some evidence of a Family Code violation, the State then has the burden of proving compliance with the statute. *Roquemore*, 60 S.W.3d at 869. This does not resolve the issue of who has the burden of proving a causal connection between the violation of the statute and the ensuing statement, however. We also agree with appellant that the State has the ultimate burden of proving that a statement is admissible under an attenuation-of-the-taint analysis, just as the State has the ultimate burden of proving a confession is voluntary, but the issue before us is who has

the initial burden regarding a causal connection, not who has the ultimate burden of persuasion. Finally, the practice commentary cited by appellant does not address the issue of who has the initial burden regarding causal connection.

The State argues that placing the burden on appellant to demonstrate a causal connection is proper because (1) inadmissibility is not established by violation of a statute alone, but only upon a showing of a causal connection between the violation and the ensuing confession and (2) it is well settled that the failure to take an arrestee before a magistrate promptly will not invalidate a confession unless there is proof of a causal connection between the delay and the confession. The State cites *Cantu v. State* for the latter proposition. *See id.*, 842 S.W.2d 667 (Tex.Crim.App.1992). In *Cantu*, the Court of Criminal Appeals looked to the appellant to demonstrate a connection between the violation of the statute and the confession. *Id.* at 680.

We agree with the State that it is appropriate to look to analogous circumstances involving a violation of a statute after which evidence, primarily a confession, is obtained. There are many cases holding that, absent a showing of a causal connection between the failure to take an accused before a magistrate promptly, as required by statute, and the accused's ensuing confession, the validity of the confession is not affected. *See, e.g., Boyd v. State*, 811 S.W.2d 105, 124 (Tex.Crim.App.1991). The appellant is generally expected to make the showing. *Id.* at 125 ("Appellant fails to demonstrate any causal connection between his statement and the failure of the authorities to take him before a magistrate."); *Schultz v. State*, 510 S.W.2d 940, 943 (Tex.Crim.App.1974) ("[A]ppellant must

show a causal connection between [the failure to take appellant before a magistrate] and his confession."); *Shadrick v. State*, 491 S.W.2d 681, 684 (Tex.Crim.App.1973) (same). This Court has also held that it is a defendant's burden to show a causal connection between the failure to take him before a magistrate and a subsequent confession in order to obtain suppression of the confession. *See Bonner v. State*, 804 S.W.2d 580, 582 (Tex.App.-Houston [1st Dist.] 1991, pet. ref'd); *Straughter v. State*, 801 S.W.2d 607, 610 (Tex.App.-Houston [1st Dist.] 1990, no pet.). In another analogous situation, this Court has placed the burden on the defendant to show a causal connection between an improper warning and a decision to submit to a breath test. *See Schafer v. State*, 95 S.W.3d 452, 455 (Tex.App.-Houston [1st Dist.] 2002, pet. ref'd).

We see no reason to apply a different burden regarding the causal-connection analysis between violations of the Family Code requirement to notify a juvenile's parents and a subsequent statement. This is particularly appropriate where the Court of Criminal Appeals has held that evidence is not obtained in violation of the law if there is no causal connection between the illegal conduct and the acquisition of the evidence. *See Gonzales*, 67 S.W.3d at 912.

Moreover, as a practical matter, it is reasonable to place the burden on the defendant to produce evidence to which only the defendant has access. The defendant alone has access to his own thought processes, and the defendant has much better access to his own parents, who are likely to be much more cooperative with their accused child and his attorney than with the State. *See, e.g., State v. Simpson*, 105 S.W.3d 238, 242-43 (Tex.App.-Tyler 2003, no pet. h.) (relying on testimony of juvenile defendant's

mother that she and her husband waited to take action concerning the defendant, having confidence that police would contact them if the child had been taken into custody). On the other hand, it is more reasonable to place the burden on the State to show attenuation of the taint because the State has control of the detention and interrogation process so that it may engage in conduct that dissipates and neutralizes the taint from any unlawful police conduct.

Accordingly, we conclude that the burden is on the juvenile defendant to show some evidence of a causal connection between the failure to notify the juvenile detainee's parents and an ensuing confession.

2. Attenuation of the taint

As pointed out above, the *Roquemore* court looked to the State to establish attenuation of the taint. *Id.*, 60 S.W.3d at 871 n. 14. The parties do not even argue about this proposition. We conclude that it is the State's burden to demonstrate attenuation of the taint, once a causal connection is shown between police illegality and the recovery of evidence.

C. Summary

For the foregoing reasons, we hold that, when a juvenile defendant seeks to suppress a confession given after the failure to notify the juvenile's parents promptly of the juvenile's whereabouts and the reason for taking the juvenile into custody, the burden is initially upon the defendant to raise the issue by producing evidence of a violation of the statutory requirement. *Roquemore*, 60

S.W.3d at 869. The burden then shifts to the State to prove compliance with the statute. *Id.* Because a violation of the statute is not alone sufficient to require exclusion of the confession, the burden then reverts to the defendant to produce evidence of a causal connection between the statutory violation and the ensuing confession. *Cf. Cantu*, 842 S.W.2d at 680. Once the defendant meets this burden, the State must then shoulder the burden of either disproving a causal connection or demonstrating attenuation of the taint. *See* GEORGE E. DIX & ROBERT O. DAWSON, 41 TEXAS CRIMINAL PRACTICE & PROCEDURE § 13.339, at 29 (2d ed. Supp.2003) ("Most likely, however, a defendant challenging evidence must show a causal connection between the section 52.02 illegality and the obtaining of the evidence. If this is shown, the State may raise and undertake to establish that the taint of the illegality was attenuated by the time the challenged evidence was obtained."). Because we addressed the violation of the statute in our original opinion, holding that the statute requiring parental notification was violated, it is unnecessary to repeat that analysis in this opinion. We thus proceed directly to a causal-connection analysis.

D. Causal-Connection Analysis

Despite arguing that it was the State's burden to negate a causal connection, appellant maintains that the causal link was clear and obvious in this case. First, appellant anticipates that the State will argue that the short length of time that appellant was detained before giving the confession negates any causal link. Appellant urges us to reject what he characterizes as a facially-appealing argument because it would reward police

officers for quickly obtaining confessions in disregard of statutory requirements. Appellant argues that a causal connection was shown by the limitless, potentially different outcomes that might have resulted if appellant's parents had been promptly notified. Appellant argues that (1) his parents might have arranged counsel for him; (2) they might have intervened with the investigators; (3) they might have arranged for appellant to be interviewed in a less coercive setting; (4) they might have advised appellant not to make any statement; or (5) any of a multitude of possibilities might have transpired. The State argues that there is no evidence of any causal connection, citing a recent case from the Fourteenth Court of Appeals. *See Vann v. State*, 93 S.W.3d 182, 185-86 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd) (finding no causal link between two-and-one-half hour delay in notifying defendant's cousin and making of defendant's written statement, when cousin was present at detention and arrest and at station during time that defendant confessed).

Regarding what effect the failure to notify appellant's parents promptly had upon his decision to confess, the record does not yield any evidence whatsoever. There is no evidence as to what appellant's parents would have done if they had been notified more promptly. There is no evidence that appellant was aware that his parents were supposed to be notified or that he was aware that they were not more promptly notified. There is no evidence that appellant asked to speak with his parents. To the contrary, there is evidence he did not ask for his parents "or anything like that." It is noteworthy that, upon being notified at 9:50 p.m., appellant's parents did not immediately attempt to contact appellant or an attorney. Instead, they

waited until the following day to visit appellant. There is also evidence that appellant did not ask to speak to an attorney when given his rights, including his right to consult with counsel.

Because appellant had the burden of producing evidence of a causal connection, and because appellant produced no evidence, but only speculation, of what might have happened, we conclude that appellant has not met his burden. It is, thus, unnecessary to conduct an attenuation-of-the-taint analysis.

We overrule appellant's first and second points of error.

Failure to Take Detained Juvenile Without Unnecessary Delay to an Office or Official Designated by the Juvenile Court

In his third and fourth points of error, appellant contends that the trial court reversibly erred in denying appellant's motion to suppress his oral statement because it was taken in violation of section 52.02(a) of the Texas Family Code. *See* Tex. Fam.Code Ann. § 52.02(a) (Vernon Supp.2004). Appellant argues that he was not taken to a juvenile processing office as designated by section 52.025(a) of the Texas Family Code and that he was not taken without unnecessary delay to an office or official properly designated by the juvenile court, as required by section 52.02(a)(2) of the Texas Family Code. *See id.* §§ 52.02(a)(2), 52.025(a) (Vernon 2002 & Supp.2004). Specifically, appellant argues that, even if the entire police station at 1200 Travis is a designated facility, appellant was not taken to an office inside designated exclusively for processing juveniles.

The Texas Family Code requires that, without unnecessary delay, a detained juvenile be released to his parents (etc.), brought before the office or official designated by the juvenile court, brought to a juvenile detention facility, or brought to a medical facility under certain conditions, but the Code provides an exception to allow a detained juvenile first to be taken to a juvenile processing office. *Id.* § 52.02(a). A juvenile processing office is defined in section 52.025 of the Texas Family Code as an office or room designated by the juvenile board for the temporary detention of a juvenile in order to return the child to his parent or custodian (etc.), to complete required paper work, to photograph and to fingerprint, to issue warnings, or to receive a statement by the juvenile. *Id.* § 52.025(a), (b).

Appellant acknowledges that there was conflicting testimony supporting the trial court's conclusion of law that appellant's statement was taken in a designated juvenile processing office. Appellant claims that this case is controlled by *Baptist Vie Le v. State,* in which the juvenile defendant was taken to the same place that appellant was taken and that place was held not to be a designated juvenile processing office. *Id.*, 993 S.W.2d 650, 654-55 (Tex.Crim.App.1999). In *Baptist Vie Le,* however, there was nothing in the record to indicate that the homicide division of the Houston Police Department was a designated juvenile processing office. *Id.* at 654.

Nevertheless, appellant argues that, even if the homicide division was a designated juvenile processing office, appellant was not taken to a particular room designated only for processing juveniles. Appellant relies on *Anthony v. State* for the proposition that, even though a police station is designated a facility for processing juveniles, the police must use an area designated exclusively

for juveniles in order to protect the juvenile from the stigma of criminality or exposure to adult offenders. *Id.*, 954 S.W.2d 132, 135-36 (Tex.App.-San Antonio 1997, no pet.), *overruled on other grounds by Gonzales*, 67 S.W.3d at 912-13, 912 n. 6 (holding that violation of Family Code does not automatically lead to exclusion of evidence). The State argues that appellant did not present this specific complaint to the trial court so as to preserve error on appeal. Appellant filed a written motion to suppress evidence. The motion specified both article 38.23 of the Texas Code of Criminal Procedure and section 52.02(b) of the Texas Family Code, but it did not mention section 52.02(a) or section 52.025 of the Texas Family Code or complain about the failure to take appellant to a designated juvenile processing office. During arguments presented in support of his motion to suppress, after having presented evidence, appellant again did not mention sections 52.02(a) or 52.025 or, in any way, allude to the failure of the police to take appellant to a designated juvenile processing office, much less one that was used exclusively for processing juveniles. Accordingly, we overrule appellant's third and fourth points of error because we conclude that he failed to preserve them by objecting on those grounds below. *See* Tex.R.App. P. 33.1(a)(1)(A).

Refusing Jury Instruction to Disregard Illegally Taken Confession

In his fifth point of error, appellant contends that the trial court reversibly erred in refusing his requested jury instruction regarding the admissibility of his illegally taken oral confession. Appellant appears to include both the rejection of his request for a jury instruction pursuant

to article 38.23 of the Code of Criminal Procedure (Texas statutory exclusionary rule) and section 52.02(b) of the Texas Family Code (failure to notify parents promptly). Appellant argues that he was entitled to the instruction because the evidence, from both the State and the defense, showed that appellant's parents were not promptly notified.

The State points out, as did the trial court below, that there was no controverted evidence regarding the issue. It is well settled that a defendant is entitled to an evidence-excluding instruction to the jury only when the evidence raises a factual issue for the jury to resolve. *Bell v. State*, 938 S.W.2d 35, 48 (Tex.Crim.App.1996). Accordingly, we overrule appellant's fifth point of error.

Exclusion of Expert Testimony Regarding Probation Suitability

In his sixth point of error, appellant contends that the trial court abused its discretion in excluding the testimony of Dr. Beth Pelz regarding appellant. Appellant argues that Dr. Pelz's testimony that appellant would not have benefitted from long-term incarceration was admissible pursuant to rule 702 of the Texas Rules of Evidence. *See* Tex.R. Evid. 702. Appellant claims that the testimony would have assisted the jury in determining appellant's sentence.

When this case was tried, and even when the parties filed their briefs, this Court had not yet decided *Peters v. State*, 31 S.W.3d 704 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd). In *Peters*, we held that suitability for probation can be relevant to the jury's recommendation of punishment, provided that it is helpful to the jury in determining

the appropriate sentence. *Id.* at 719. We pointed out to the bench and bar that important changes in article 37.07, section 3(a) of the Texas Code of Criminal Procedure[1] may make evidence admissible, despite much case law holding similar evidence per se inadmissible under the prior and more restrictive version of that statute. *Id.* at 722. We were speaking of the very case law upon which the State is relying here.

During the trial of this case, the State requested a hearing outside the presence of the jury to determine the admissibility of Dr. Pelz's testimony as an expert. Defense counsel first presented Dr. Pelz's credentials, which included expertise in the sociology of gangs. Initially, when the trial court asked if defense counsel was presenting Dr. Pelz to give her opinion as to whether appellant should get probation, defense counsel emphatically denied that she could give her opinion as to whether or not appellant should get probation. After defense counsel presented some testimony, and a couple of attempts at a proffer, the trial court expressed concern about what the exact nature of Dr. Pelz's testimony would be. Finally, defense counsel stated that Dr. Pelz would give three expert opinions: (1) that, based on everything Dr. Pelz knew, appellant would be a good candidate for probation; (2) that incarceration in the penitentiary for a person of appellant's maturity, coupled with his gang affiliation, would have a long-standing, detrimental impact on appellant, not serving society's purpose; and (3) that her observation of appellant showed him to be an immature individual who had been impacted by gang-type activities and individuals in the

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[1] Tex.Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) (Vernon Supp.2004).

gang. After further examination and cross-examination, the prosecutor stated that he had no objection to Dr. Pelz's testifying about the impact of gangs on a person of appellant's maturity.

The trial court ruled that Dr. Pelz's qualifications and professional background were impressive, but in regard to Dr. Pelz's stating her opinions about appellant's suitability for probation and the adverse effect of incarceration, the trial court found that nothing had been presented to show that Dr. Pelz's findings or opinions were accepted as valid in the scientific community, that they were grounded on any particularly reliable scientific procedure, or that they were reliable. The trial court concluded that, given the speculative nature of Dr. Pelz's opinions, they were entirely too nebulous and speculative to assist the jury. The trial court ruled that Dr. Pelz's opinions as to the desirability of probation and the impact of incarceration would not be admissible, but that her opinions as to appellant's maturity and attraction to gangs would be admissible.

It is noteworthy that, although the State relied upon the old line of cases that we held in *Peters* were supplanted by statutory changes, the trial court here acknowledged appellant's argument at trial that the State's authority predated the new rules of evidence relative to expert opinions. The trial court did not base its ruling on the old line of cases, but, rather, upon an application of the rules of evidence concerning expert opinions, their reliability, and their ability to assist the jury to determine an issue in the case.

Here, the trial court performed its duty to determine whether the expert opinions in question would be helpful to the jury in determining the appropriate sentence in this

case.[3] *See Peters*, 31 S.W.3d at 718 (quoting *Mendiola v. State*, 21 S.W.3d 282, 285 (Tex.Crim.App.2000)). We hold that the trial court's obviously conscientious efforts in this case were well within the zone of reasonable disagreement so as not to constitute an abuse of discretion. *See Hankton v. State*, 23 S.W.3d 540, 546-47 (Tex.App.-Houston [1st Dist.] 2000, pet. ref'd).

Accordingly, we overrule appellant's sixth point of error.

Conclusion

We affirm the judgment of the trial court.

En banc consideration was requested.

A majority of the Justices of the Court voted for en banc consideration.

The en banc Court consists of Chief Justice RADACK and Justices HEDGES, TAFT, NUCHIA, JENNINGS, KEYES, ALCALA, HANKS, HIGLEY, MIRABAL, and DUGGAN.

Justice KEYES, joined by Justices MIRABAL and DUGGAN, dissenting.

Justice MIRABAL, joined by Justices KEYES and DUGGAN, dissenting.

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[3] Although some of the trial court's remarks appeared to be more appropriate to a "hard science" or "soft science" reliability determination, the trial court's ultimate holding was that Dr. Pelz's opinions would not be helpful to the jury, anticipating our decision in *Peters*.

MARGARET GARNER MIRABAL, Justice (Assigned), dissenting.

A jury found appellant, John Tuy Pham, guilty of murder and assessed punishment at confinement for life.[1] By opinion dated December 28, 2000, we reversed the judgment and remanded the cause. *Pham v. State*, 36 S.W.3d 199, 205 (Tex.App.-Houston [1st Dist.] 2000), *vacated and remanded*, 72 S.W.3d 346 (Tex.Crim.App.2002). The specific reason for the remand of this case to us is stated in the Court of Criminal Appeals's opinion as follows:

> Recently, in *Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App.2002), we . . . concluded that before a juvenile's written statement can be excluded, there must be a causal connection between the Family Code violation and the making of the statement. *Id.* at 912. The Court of Appeals in the instant case did not have the benefit of our opinion in *Gonzales*.

72 S.W.3d at 346. Accordingly, the court remanded this case to us for reconsideration in light of *Gonzales*. *Id.*

DISCUSSION

Gonzales states that article 38.23(a) of the Texas Code of Criminal Procedure provides the proper mechanism for excluding evidence in violation of the Family Code. *Gonzales*, 67 S.W.3d at 913; *see* Tex.Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp.2004). In our original *Pham* opinion, we acknowledged that whether or not the juvenile's written statement should be excluded was to be determined under

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[1] Appellant was a juvenile who was certified to stand trial as an adult.

article 38.23(a). *Pham*, 36 S.W.3d at 202 n. 2, 205.[2] In *Gonzales*, the court noted that "an exclusionary analysis under article 38.23(a) necessarily entails a causal connection analysis" and pointed to *Comer*[3] as an example of a similar case in which a causal connection analysis had been performed. *Gonzales*, 67 S.W.3d at 913 n. 8. In our original *Pham* opinion, we carefully followed the same causal connection analysis utilized by *Comer*. *Pham*, 36 S.W.3d at 204-05. I note that the Court of Criminal Appeals also pointed to the *Comer* analysis as an example of an appropriate article 38.23 causal connection analysis in *Roquemore v. State*, 60 S.W.3d 862, 870 (Tex.Crim.App.2001), and that the *Roquemore* opinion cited our original *Pham* opinion with approval. *Id.* at 869.

I further note that in our original opinion, we pointed to the evidence that appellant's parents were not notified about appellant's arrest until almost 10 p.m. and that it was not until the following morning that they found out why appellant had been arrested. *Id.* at 201.[4] Appellant's

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[2] In our original *Pham* opinion, we stated, "Illegally obtained evidence is inadmissible against an accused," citing Code of Criminal Procedure article 38.23(a). *Pham*, 36 S.W.3d at 202. We further noted in footnote two of the opinion that "[t]he Texas Family Code expressly makes Chapter 38 of the Texas Code of Criminal Procedure applicable to juvenile proceedings." *Id.* at 202 n. 2 (citing Tex. Fam.Code Ann. § 51.17(c) (Vernon 2002)). We then concluded: "Accordingly, appellant's statement should have been suppressed under article 38.23 of the Texas Code of Criminal Procedure." *Id.* at 205.

[3] *Comer v. State*, 776 S.W.2d 191 (Tex.Crim.App.1989).

[4] The evidence shows that the parents were not given an explanation, even though subsection 52.02(b) requires the officer promptly to give "a statement of the reason for taking the child into custody," in addition to notice that the child is in custody. Tex. Fam.Code Ann. § 52.02(b) (Vernon 2002); *see Hampton v. State*, 86 S.W.3d 603, 609 (Tex.Crim.App.2002).

parents should have been promptly notified shortly after their son's arrest at 2:35 in the afternoon so that they could have had an opportunity to join appellant at the juvenile processing office and could have arranged for an attorney to join appellant at the juvenile processing office if they had wished.

Family Code subsection 52.025(c) specifically provides as follows: "A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney." Tex. Fam.Code Ann. § 52.025(c) (Vernon 2002). As the court in *Comer* concluded, I likewise conclude that we cannot say with any degree of confidence that if appellant had had access to his parents or his attorney, he would still have chosen to confess to the crime. *See Comer,* 776 S.W.2d at 197. Accordingly, applying the same causal connection analysis utilized by *Comer,* which the Court of Criminal Appeals cited as an example of an appropriate article 38.23 causal connection analysis in *Gonzales* and *Roquemore,* I conclude that appellant's statement should have been suppressed under article 38.23 of the Texas Code of Criminal Procedure.

For the foregoing reasons, and the reasons stated in our original *Pham* opinion, which I incorporate by reference, I would reverse the judgment and remand the cause to the trial court for further proceedings.

EVELYN V. KEYES, Justice, dissenting.

Because I believe the majority has misunderstood the Court of Criminal Appeals' instructions to us on remand and has misconstrued and misapplied the law, I respectfully dissent.

A jury found appellant, John Tuy Pham, a juvenile certified to stand trial as an adult, guilty of murder and assessed punishment at confinement for life. Appellant argued on appeal that the judgment should be reversed because his confession was obtained in violation of section 52.02(b) of the Family Code, which requires prompt parental notification of the detention of a juvenile and the reason for the detention. By opinion dated December 28, 2000, we reversed the judgment and remanded the cause. *Pham v. State*, 36 S.W.3d 199, 205 (Tex.App.-Houston [1st Dist.] 2000), *vacated by* 72 S.W.3d 346 (Tex.Crim.App.2002). The Court of Criminal Appeals vacated our judgment and remanded for reconsideration in light of its opinion in *Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App.2002). *Gonzales* held that, "before a juvenile's written statement can be excluded, there must be a causal connection between the Family Code violation and the making of the statement." *Pham*, 72 S.W.3d at 346; *see Gonzales*, 67 S.W.3d at 912. I believe the majority misconstrues the meaning of "causal connection," erroneously places the burden of proof on the defendant, and assesses the wrong factors in determining whether the confession of a juvenile should be excluded.

Family Code Section 52.02(b) and Code of Criminal Procedure Article 38.23

Appellant contends the officers who took him into custody did not comply with section 52.02(b) of the Family Code and therefore his confession must be suppressed. Section 52.02(b) states that "[a] person taking a child into custody shall promptly give notice of the person's action and a statement of the reason for taking the child into custody to: (1) the child's parent, guardian, or custodian; and (2) the office or official designated by the juvenile

board." Tex. Fam.Code Ann. § 52.02(b) (Vernon Supp.2004). Provisions of the Family Code control issues concerning juvenile confessions, although they are raised in a criminal forum. *Griffin v. State,* 765 S.W.2d 422, 427 (Tex.Crim.App.1989); *Smith v. State,* 881 S.W.2d 727, 731 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd). When a juvenile is in custody, strict compliance with the requirements of the Family Code is mandated. *See Roquemore v. State,* 60 S.W.3d 862, 872 (Tex.Crim.App.2001); *Comer v. State,* 776 S.W.2d 191, 194 (Tex.Crim.App.1989).

However, section 52.02(b) is "not an independent exclusionary statute." *Gonzales,* 67 S.W.3d at 912. Thus, a violation of section 52.02(b) does not make a juvenile's confession automatically inadmissible. *Id.* Rather, evidence obtained in violation of the Family Code is excluded through the operation of article 38.23(a) of the Code of Criminal Procedure. *Gonzales,* 67 S.W.3d at 913.[1] Article 38.23(a) provides that "[n]o evidence *obtained* . . . *in violation* of any provisions of [state or federal law] shall be admitted in evidence" against a defendant in a criminal case. Tex.Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp.2003) (emphasis added). However, "evidence is not 'obtained . . . in violation' of a provision of law [unless] there is [a] causal connection between the illegal conduct and the acquisition of the evidence." *Gonzales,* 67 S.W.3d at 912; *Schafer v. State,* 95 S.W.3d 452, 455 (Tex.App.-Houston [1st Dist.] 2002, pet. dism'd). Article 38.23 thus embraces the attenuation doctrine, which is a method for determining

[1] The Texas Family Code expressly makes Chapter 38 of the Code of Criminal Procedure applicable to juvenile proceedings. *See* Tex. Fam.Code Ann. § 51.17(c) (Vernon Supp.2004); *see also Le v. State,* 993 S.W.2d 650, 656 (Tex.Crim.App.1999).

whether evidence was "obtained" in violation of law. *Johnson v. State*, 871 S.W.2d 744, 750-51 (Tex.Crim.App.1994). Under the attenuation doctrine, evidence whose acquisition is sufficiently attenuated from a violation of the law is not considered to be "obtained . . . in violation" of law and need not be excluded. *Id.* at 750. Thus, an otherwise valid confession following an illegal detention will not be excludable under article 38.23 when it is determined that the taint of the illegality has dissipated by the time the confession was taken. *Gonzales*, 67 S.W.3d at 913, n. 10; *Comer*, 776 S.W.2d at 196. In such a case, the causal chain between the illegal arrest and the acquisition of the statement is broken. *See Bell v. State*, 724 S.W.2d 780, 788 (Tex.Crim.App.1986).

Burden of Proof

When a juvenile defendant seeks to suppress a confession allegedly obtained in violation of section 52.02(b) of the Family Code, the burden of proof is initially on the defendant to show a violation of that section; once the defendant has shown a violation, the burden shifts to the State to prove compliance with section 52.02(b). *See Roquemore*, 60 S.W.3d at 869-70; *Russell v. State*, 717 S.W.2d 7, 9-10 (Tex.Crim.App.1986). If after reviewing the defendant's evidence of a violation of section 52.02(b) and the State's evidence of compliance we find a violation of section 52.02(b), we must still determine whether the confession was "obtained" in violation of law, so that exclusion is necessary under article 38.23, or whether the taint of the section 52.02(b) violation is so attenuated that article 38.23 does not require exclusion. *See Roquemore*, 60 S.W.3d at 870.

Violation of Section 52.02(b)

Appellant contends that the officers who took him into custody did not comply with the prompt notice provision of Section 52.02(b) of the Texas Family Code. Section 52.02(b)(1) requires that *"[a] person taking a child into custody shall promptly give notice of the person's action and a statement of the reason* for taking the child into custody, to: (1) the child's parent, guardian, or custodian." Tex. Fam.Code Ann. § 52.02(b)(1) (emphasis added). Section 52.02(b) does not define the term "promptly." The issue presented, therefore, is whether notice from the officer at the juvenile holding facility to appellant's sister, approximately six hours after his arrest, or to his father more than seven hours after the arrest, was "prompt" notice to appellant's "parent, guardian, or custodian" within the meaning of section 52.02(b).

In deciding whether parental notification under section 52.02(b) was prompt, courts have considered (1) the length of time the juvenile had been in custody before parental notification; (2) whether notification occurred before or after the officers obtained a statement; (3) the ease with which the officers were able to contact the parent; and (4) the actions of the officers during the period of delay. *Vann v. State*, 93 S.W.3d 182, 185 (Tex.App.-Houston [14th Dist.] 2002, pet. ref'd); *but see In re J.B.J.*, 86 S.W.3d 810, 814-15 (Tex.App.-Beaumont 2002, no pet.) (observing that factors noted in *Vann* are "relevant considerations," but applying totality of circumstances test to determine whether notification was made with reasonable speed).

Here, appellant was detained at 2:35 p.m. He had been in custody somewhat less than 6 hours when his

sister was notified of his whereabouts, at approximately 8:15 p.m., and 7 hours and 15 minutes when his father – the proper person to receive notice under the statute – was contacted, at approximately 9:50 p.m. No notice of the reason for his detention was given until the next morning. Meanwhile, the officers had taken appellant's statement at 4:38 p.m., two hours after his initial detention. The officers took appellant to be warned by a magistrate; took him to the downtown police station to be interrogated by an investigator, to whom he gave his statement; drove him to a juvenile processing facility to be processed, fingerprinted, and photographed; and, only afterwards, notified his sister of his whereabouts. The officers made no attempt whatsoever to notify appellant's parents of his detention until almost 10:00 p.m. When the parents were finally contacted, they were not given an explanation, even though subsection 52.02(b) requires that the officer promptly give the parents not only notice that the child is in custody but also "a statement of the reason for taking the child into custody." Tex. Fam.Code Ann. § 52.02(b); *see Hampton v. State*, 86 S.W.3d 603, 609 (Tex.Crim.App.2002). I would, therefore, find that appellant bore his burden of showing a violation of section 52.02(b).

By contrast, the State presented no evidence of its compliance with section 52.02(b). Instead, the State argues in its brief that the evidence supports the conclusion that appellant's parents were notified, at the earliest, when appellant was taken into custody at 2:45 p.m., based on Sergeant Gillane's testimony that he notified the high school principal of appellant's arrest about 2:45 p.m., and his understanding of school procedures. However, there is no evidence that the school actually notified, or even attempted to notify appellant's parents, and appellant's

mother testified that no one from the school notified her. The trial judge found that there was no notice to appellant's family until 8:15 p.m., a finding that precludes our consideration of the State's argument that notice occurred earlier; and the evidence supports the trial court's fact finding that no one in appellant's family was notified until that evening. Moreover, even had the school notified appellant's family, the officers who took appellant into custody would not have been relieved of their statutory duty to give appellant's parents prompt notice of the detention and the reason for it.

The duty to notify a child's parent, guardian, or custodian belongs to the "person taking a child into custody," *i.e.*, Officers Hale and Parish, and their supervisor, Office [sic] Miller, in this case. Tex. Fam.Code Ann. § 52.02(b). It was their responsibility to see to it that notice of appellant's arrest, with a statement of the reason for taking him into custody, was promptly given to appellant's parents and the official designated by the juvenile court. *See In re C.R.*, 995 S.W.2d 778, 783 (Tex.App.-Austin 1999, pet. denied) (parent must be notified that child has been taken into custody and the reasons why). The delegation of responsibility for notification may be delegated (as here) to another *officer*, but, once it is delegated, that officer must comply with section 52.02(b). *In re J.B.J.*, 86 S.W.3d at 815. Section 52.02(b) does not permit delegation of this responsibility to a non-officer. Nor, in my judgment, is notification of appellant's sister adequate; rather, the State's duty of notification was fulfilled only when appellant's *parents* were notified both of his detention and of the reason for it. *Cf. Vann*, 93 S.W.3d at 184-85 (notification of juvenile's adult cousin, who was adult most often at home

in home where juvenile often resided satisfied section 52.02(b) requirement that "custodian" be notified).

What is striking about this case is that the arresting officers, and their supervisor, Officer Miller, did not consider it their responsibility to notify appellant's parents about his arrest. Officer Miller testified as follows:

> Q. [Prosecutor]: As far as during the time period you had the defendant in your custody there, did you at any time talk with any family member of the defendant as far as where the defendant was and what was going on with the case at that point?
>
> A. [Officer Miller]: No, I didn't.
>
> Q. Subsequent to that did other officers do that?
>
> A. Yes, they did.
>
> Q. And who was that?
>
> A. Officer Parham in the juvenile division contacted the defendant's sister at 8:15. And the Harris County juvenile probation contacted the defendant's father at approximately 9:50.
>
> . . . .
>
> Q. [Defense Counsel]: And I think you testified that you did not, and I may be wrong, but, you did not contact John Pham's parent, guardian or custodian once John Pham was taken into custody?
>
> A. [Officer Miller]: I did not. It was done by Officer Parham in the juvenile division.
>
> . . . .

Q. Okay. Well, when was John Pham taken into custody?

A. When he was picked up out at the school.

Q. And when did Officer Parham contact or when was Officer Parham alerted as to the arrest of John Pham and the necessity by Officer Parham to comply with Sec. 52.02 of the Family Code relative to release or delivery to the court?

A. Officer Parham contacted the defendant's sister at 8:15 p.m.

. . . .

Q. And did you talk to Officer Parham yourself?

A. Nope, I did not.

Q. Who did, if you know?

A. Who talked to Officer Parham?

Q. Correct.

A. From our division? I don't understand. I am sure that many people talk to Officer Parham, but pertaining to what?

Q. Well, pertaining to this case who contacted Officer Parham for purpose of alerting him that a juvenile was in custody and that he needed to contact the child's parent, guardian or custodian, if you know?

A. I don't know.

Q. [A]s I understand your testimony the only time or the first time that a person with the juvenile authorities is contacted is when Officer Parham . . . was contacted relative to John Pham

at 8:00 o'clock or 8:15 or something along those lines.

A. Basically that would be correct. The defendant was arrested. He made a statement, a voluntary statement. He was transferred to the juvenile division who notified the defendant's family and also notified Harris County Juvenile Probation who then, I assume, although I don't know who did it, notified the juvenile courts and it happened within that chronological order generally speaking.

It is obvious from Officer Miller's testimony that he was under the impression the arresting officers had no duty to notify a child's parents upon a child's arrest. Officer Miller, one of the lead investigators in this murder case, apparently believed that the homicide division could hold appellant as long as necessary to interrogate him without any notice to appellant's parents – that it was the responsibility of juvenile officers to notify appellant's parents after homicide was finished with the interrogation and after homicide had transported appellant to the Mykawa Road juvenile processing office across town.

I would hold that section 52.02(b) of the Family Code was violated by the State's failure to give appellant's parents prompt notice of his detention and of the reason for it. The next step is to determine whether the violation caused the acquisition of appellant's confession to be obtained in violation of law, and therefore to be subject to exclusion under article 38.23, or whether the taint was so attenuated that exclusion was not required.

Causal Connection and Attenuation of the Taint

The majority would place a burden on a juvenile who seeks to suppress a confession taken in violation of section 52.02(b) to establish a "causal connection" between the violation and his confession by proving (1) that he was aware of his right to have his parents present; (2) that he was aware they were not promptly notified; (3) that he asked to speak with his parents; and (4) that his parents *would have* attempted to contact him or an attorney *had* they been notified of his detention and the reason for it. The majority cites no authority for the startlingly onerous burden it creates for juvenile defendants; nor is there any; such a burden is wholly unprecedented.

Our task is not to determine the extent of appellant's knowledge of and insistence on his rights against the willful obstruction of those rights by the police to prove that his confession was caused by their violations of law. A violation of section 52.02(b) having been found, our task is to determine whether appellant's confession must be excluded through the operation of article 38.23 or whether the taint of the illegal acquisition of confession was so attenuated that the causal chain was broken and the confession could not be said to have been obtained in violation of law.

Here, while no attempt was made to contact appellant's parents, as required by section 52.02(b), appellant was taken from school by the arresting officers to be warned by a magistrate and then taken directly to the downtown police station to be interrogated by an investigator, where he gave his confession. His parents were not notified of his detention until after he had been processed into a juvenile facility, more than seven hours after he had

been taken into custody, and they were not told why he was there until the following morning. If there is nothing in the record to indicate that appellant was aware of his right of access to his parents, it is because the officers never informed him of that right and made no attempt to ensure that he was accorded it, even though *they* – not appellant – had the burden of informing appellant's parents of his detention and the reason for it. If there is nothing in the record to show that appellant was aware that his parents were not promptly notified, it is because he could have discovered that they were not notified only from the arresting officers, who alone had that information and who had him in custody. If there is nothing in the record to indicate what appellant's parent *would have done* had they been told before 10:00 o'clock at night where their son was or, even then, why he was in custody, it is because counterfactual universes – those in which things did *not* happen – do not produce evidence of what *did* happen. But none of these considerations is material to our task of determining whether the taint of the section 52.02(b) violation had so dissipated that article 38.23 does not require exclusion of the illegally obtained confession.

To determine whether the taint has dissipated, we must conduct a taint attenuation analysis, utilizing the four factors from *Bell*, 724 S.W.2d at 788. *Comer*, 776 S.W.2d at 196-97; *see also Johnson*, 871 S.W.2d at 750. Those factors are: (1) the giving of *Miranda* warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *Bell*, 724 S.W.2d at 788.

In similar although less egregious circumstances, the Court of Criminal Appeals held in *Comer* that detaining a

juvenile defendant for three hours while officers obtained his confession before taking him to a juvenile processing facility violated section 52.02(a) of the Family Code.[2] 776 S.W.2d at 197. The court further concluded that the taint of officers' unlawfully detaining the juvenile appellant for approximately three hours to obtain his confession before taking him to either an authorized officer of the juvenile court or to a juvenile detention center had not dissipated at the time he gave his confession. 776 S.W.2d at 196. It observed:

> The record reflects appellant was fully cautioned by Justice of the Peace Malcolm before he gave his statement. However, every other factor in the attenuation of taint analysis adopted in *Bell v. State, supra,* at 788, militates in favor of our conclusion appellant's confession was illegal: it was taken immediately upon his having been taken into custody, without intervening circumstances, by officers whose exclusive reason for failing to comply with § 52.02(a), *supra,* was to obtain the statement. We do not imply that the officers willfully violated the law in this case. Nevertheless, in taking upon themselves the decision to interrogate appellant, the officers usurped a function which Title 3 vests in the officer designated by the juvenile court. We cannot say with any degree of confidence that, had appellant been transported 'forthwith' to the custody of the juvenile detention

[2] Section 52.02(a) requires essentially that "a person taking a child into custody, without unnecessary delay and without first taking the child to any place other than a juvenile processing office," must release the child to a designated responsible adult, or bring the child before the official designated by the juvenile board or to a detention facility designated by the juvenile board or to a secure detention facility, or release him. Tex. Fam.Code Ann. § 52.02(a).

> facility, where he may have had access to, if not counsel, at least his parents . . . he would still have chosen to confess his crime. Appellant's statement should have been suppressed under Article 38.23, *supra*.

Comer, 776 S.W.2d at 196-97.

Here, although appellant was taken into custody at 2:35 in the afternoon, appellant's parents were not notified about his arrest until almost 10 p.m., and it was not until the following morning that they found out why appellant had been arrested. During this time, appellant was taken before a magistrate and given his *Miranda* warnings, then taken to the police station to give his statement, and only then, after the statement was taken, transferred to a juvenile processing facility and processed. The record reflects that the arresting officers and their supervisor did not consider it their responsibility to notify appellant's parents about his arrest and did not attempt to notify them; they left that task to officials at the juvenile processing center to fulfill after processing was complete; even then, the State did not fulfill its duty to notify appellant's parents both of his detention *and* of the reason for it until the next day. The officers thus took it upon themselves to interrogate appellant without notifying his parents; and they held him in violation of his rights under the Family Code for a much longer time before fulfilling their duty under the Code than the officers in *Comer*.[3]

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[3] As in *Comer*, the officers in this case also interrogated appellant before taking him to a juvenile processing facility. The majority finds, however, that appellant waived his right to object to interrogation by the arresting officers rather than by an officer designated by the juvenile court because he failed to object in the trial court to the officers'

(Continued on following page)

As in *Comer*, every factor in the attenuation of taint analysis adopted in *Bell v. State*, other than the giving of *Miranda* warnings, indicates that the taint had not dissipated. Rather, the fact that the arresting officers immediately took appellant to be interrogated at the police station without even attempting to notify his parents of his whereabouts or the reason for his detention supports the inference that appellant's detention and prompt interrogation without parental notice – the violation of section 52.02(b) – caused appellant to give the officers the confession they wanted. Appellant had an absolute right to have his parents or attorney accompany him in the juvenile processing office; yet he did not have that opportunity because his parents were not promptly notified.

As the Court of Criminal Appeals observed in *Roquemore*, "The Family Code seeks to strike a balance between the competing interests of public safety and child welfare." 60 S.W.3d at 872.[4] The balance is struck, in part, by limiting the investigative function of the police in juvenile cases. *Id.* We must give effect to the legislature's intent by requiring strict compliance with those provisions of the Family Code regarding the arrest of juveniles. *Id.* Here, the limitation placed by section 52.02(b) of the Code on the investigative function of the police was ignored. Appellant's parents should have been promptly notified shortly after their son's arrest so that they could have had

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violation of section 52.02(a). I would not reach this issue because I would find a violation of section 52.02(b).

[4] *Roquemore* reversed a decision of this Court that a Rule 52.02(a) violation did not require exclusion of the confession of a juvenile and expressly disapproved this Court's limiting *Comer* to its facts. 60 S.W.3d at 872.

an opportunity to join appellant at the juvenile processing office and could have arranged for an attorney to join appellant at the juvenile processing office if they had wished. *See Gonzales*, 67 S.W.3d at 911 (noting 5 to 6 hour delay that occurred after juvenile was processed into detention facility); *Hill v. State*, 78 S.W.3d 374, 382-84 (Tex.App.-Tyler 2001, pet. ref'd) (holding notice not prompt where officers waited 4 hours and 20 minutes before notifying mother, after defendant had confessed, and reversing case); *In re C.R.*, 995 S.W.2d at 782-83 (holding juvenile's confession inadmissible because of violation of Family Code Section 52.02(b) where no attempt was made to contact mother until after officers took juvenile to juvenile processing center, issued warnings, and took statement).

As in *Comer*, I could not say with any degree of confidence that, if appellant had access to his parents or his attorney, he would still have chosen to confess to the crime. *See Comer*, 776 S.W.2d at 197. Accordingly, I would hold that appellant's statement should have been suppressed under article 38.23 of the Texas Code of Criminal Procedure.

I would reverse the judgment and remand the cause to the trial court for further proceedings.

Court of Criminal Appeals of Texas.

John Tuy PHAM, Appellant,

v.

The STATE of Texas.

No. 198-01.
April 10, 2002.

Appeal from 177th District Court, Harris County, Carol Davies, Judge.

Petition for Discretionary Review from the Court of Appeals, First Supreme Judicial District.

OPINION

The opinion of the Court was delivered PER CURIAM.

A jury found Appellant guilty of murder and assessed punishment at confinement for life. The Court of Appeals reversed the conviction based on its conclusion that the trial court erred to admit Appellant's confession. *Pham v. State*, 36 S.W.3d 199 (Tex.App.-Houston [1st Dist.] 2000). The Court of Appeals held the confession was inadmissible because of the State's violation of V.T.C.A. Family Code, § 52.02(b), which requires that a juvenile's parent or guardian be promptly notified that the juvenile has been taken into custody. The Court of Appeals concluded the trial court reversibly erred to admit Appellant's confession. *See* Article 38.23, V.A.C.C.P.; Tex.R.App.P. 44.2(b).

The State has filed a petition for discretionary review contending the Court of Appeals erred to conclude that any statement given by the juvenile must be suppressed because of the failure to notify the juvenile's parent, guardian, or custodian that the juvenile had been taken into custody. The State also argues that no causal connection exists

between the failure to notify and any statement subsequently made by the juvenile.

Recently, in *Gonzales v. State*, 67 S.W.3d 910 (Tex.Crim.App.2002), we addressed the same issue. We concluded that before a juvenile's written statement can be excluded, there must be a causal connection between the Family Code violation and the making of the statement. *Id.* at 912. The Court of Appeals in the instant case did not have the benefit of our opinion in *Gonzales*. Accordingly, we grant grounds one and two of the State's petition for discretionary review, vacate the judgment of the Court of Appeals, and remand this case to the Court of Appeals in light of our opinion in *Gonzales*.

Court of Appeals of Texas,
Houston (1st Dist.).

John TUY PHAM, Appellant,

v.

The STATE of Texas, Appellee.

No. 01-99-00631-CR.
Dec. 28, 2000.

Panel consists of Justices MIRABAL, ANDELL, and LEE DUGGAN, Jr.*

OPINION

MIRABAL, Justice.

A jury found appellant, John Tuy Pham, guilty of murder and assessed punishment at confinement for life.[1] We reverse and remand.

In appellant's first point of error, he asserts the trial court erred in overruling his motion to suppress his oral confession because his parents were not notified about his arrest as required by Texas Family Code section 52.02(b).

EVIDENCE AT MOTION TO SUPPRESS HEARING

On August 22, 1998, Dung Van Ha, complainant, was killed in a drive by shooting. Appellant, a 16-year-old high school junior, became a suspect in complainant's murder.

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* The Honorable Lee Duggan, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

[1] Appellant was a juvenile who was certified to stand trial as an adult.

One of the lead investigators in the case was Houston Police Officer T. Miller of the homicide division. On September 9, 1998, at the direction of Officer Miller, Houston Police Officers Hale and Parish went to Clear Brook High School to take appellant into custody in connection with the murder of complainant. Hale and Parish met with Sergeant J. Gillane, a Galveston County Sheriff's Department Officer assigned to Clear Brook High School, and he told them he would locate appellant and bring him to the officers so they could talk with him. Appellant had skipped his last class of the day and was not in his classroom. School let out at 2:30 p.m. Gillane saw appellant riding as a passenger in a car about to leave the school parking lot at about 2:35 p.m., and Gillane asked appellant to step out of the car so Gillane could speak with him. Gillane and appellant knew each other, and appellant cooperated fully. Gillane walked with appellant to where Officers Hale and Parish were waiting.

Officers Hale and Parish took appellant into custody and drove him to 49 San Jacinto St. where, at about 3:35 p.m., Magistrate Howard Dixon gave him his legal warnings pursuant to section 51.095 of the Texas Family Code. Magistrate Dixon had been designated as a magistrate for purposes of the Family Code to give required warnings to juveniles. Hale and Parish then took appellant to the downtown police station at 1200 Travis St.; Hale testified this was one of the designated juvenile processing offices in the city. Hale turned appellant over to Officer Miller, the lead investigator who had sent Hale and Parrish [sic] to the high school to arrest appellant. Neither Officer Hale nor Officer Parrish attempted to contact appellant's parents at any time.

Officer Miller listened to a tape recording of Judge Dixon giving appellant his legal warnings. Miller met with appellant. Miller did not attempt to contact appellant's parents. Around 4:38 p.m., appellant gave an oral statement in which he admitted that he fired a .45 caliber weapon at the car complainant was driving. Appellant was then turned over again to Officers Hale and Parrish. Again, neither Hale nor Parrish attempted to contact appellant's parents. They transported appellant to the juvenile processing office located at 8300 Mykawa Rd. so that he could be processed, fingerprinted, and photographed.

Officer Parham at the juvenile processing office contacted appellant's sister at home around 8:15 p.m., and the Harris County Juvenile Probation Department contacted appellant's father at approximately 9:50 p.m.

Appellant's mother testified that neither she nor appellant's father was contacted by anyone from the high school, or from the Houston Police department, regarding her son's arrest until almost 10 p.m. that night when she received a call from a juvenile officer. It was not until the following morning that she found out why appellant had been arrested. There was no testimony from any representative of the high school as to any attempt by the principal's office to contact appellant's parents.

DISCUSSION

Provisions of the Texas Family Code control issues concerning juvenile confessions, although they are raised in a criminal forum. *Griffin v. State*, 765 S.W.2d 422, 427 (Tex.Crim.App.1989); *Smith v. State*, 881 S.W.2d 727, 731 (Tex.App.-Houston [1st Dist.] 1994, pet. ref'd). Therefore,

when a juvenile is in custody, the requirements of the Texas Family Code must be strictly complied with. *See Le v. State,* 993 S.W.2d 650, 655 (Tex.Crim.App.1999); *Comer v. State,* 776 S.W.2d 191, 194 (Tex.Crim.App.1989).

Section 52.02(b) of the Texas Family Code states that "[a] **person taking a child into custody *shall promptly*** give notice of his action and a statement of the reason for taking the child into custody, to: (1) the child's parent, guardian, or custodian; and (2) the office or official designated by the juvenile court." Tex.Fam.Code § 52.02(b) (Vernon Supp.2000) (emphasis added). Section 52.02(b) does not define the term "promptly."

When, as here, a defendant seeks to suppress evidence, the burden of proof is initially on the defendant. *See Russell v. State,* 717 S.W.2d 7, 9 (Tex.Crim.App.1986); *Ashcraft v. State,* 934 S.W.2d 727, 735 (Tex.App.-Corpus Christi 1996, pet. ref'd). A defendant must produce evidence that defeats a presumption of proper police conduct, which then shifts the burden to the State. *See Russell,* 717 S.W.2d at 9; *Ashcraft,* 934 S.W.2d at 735. Therefore, once a juvenile defendant puts on evidence that section 52.02(b) of the Family Code was not complied with, the burden shifts to the State to show that the juvenile's statement was taken in compliance with section 52.02(b). *In the Matter of C.R.,* 995 S.W.2d 778, 783 (Tex.App.-Austin 1999, pet. denied). Illegally obtained evidence is inadmissible against an accused. Tex.Crim.P.Code Ann. art. 38.23(a) (Vernon Supp.2000).[3]

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[3] The Texas Family Code expressly makes Chapter 38 of the Texas Code Criminal Procedure applicable to juvenile proceedings. *See*

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We generally review a trial court's ruling on a motion to suppress for abuse of discretion. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App.1996); *Curry v. State*, 965 S.W.2d 32, 33 (Tex.App.-Houston [1st Dist.] 1998, no pet.). In reviewing the trial court's ruling, we apply a bifurcated standard of review. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex.Crim.App.2000); *Hernandez v. State*, 957 S.W.2d 851, 852 (Tex.Crim.App.1998) (applying standard of review from *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App.1997) to claim of involuntariness of oral and written statements). We give almost total deference to the trial court's determination of historical facts, while we conduct a de novo review of the trial court's application of the law to those facts. *Carmouche*, 10 S.W.3d at 327. The trial court is the exclusive finder of fact in a motion to suppress hearing, and, as such, it may choose to believe or disbelieve any or all of any witness's testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App.1990).

The trial court specifically found that appellant's parents were not notified about his arrest until after he had given the confession and had been transported to the Mykawa Road juvenile processing office. In written findings of fact and conclusions of law, the trial court stated, in part:

Findings of Fact

26. After Defendant was processed into the juvenile holding facility, Officer Parham contacted Defendant's sister regarding Defendant's whereabouts at approximately

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Tex.Fam.Code § 51.17(c) (Vernon Supp.2000); *see also Le v. State*, 993 S.W.2d 650, 656 (Tex.Crim.App.1999).

8:15 p.m. At approximately 9:50 p.m. the same evening the juvenile probation department communicated with Defendant's father. Less than 6 hours elapsed from the time of Defendant's initial detention until a member of Defendant's family was notified of Defendant's arrest.

Conclusions of Law

6. Defendant's family was promptly notified within the requirements of Texas Family Code Section 52.02(b).

The issue presented, therefore, is whether notice from the officer at the juvenile holding facility to appellant's sister, approximately six hours after his arrest, was "prompt" notice to appellant's parents, by the "person taking a child into custody" within the meaning of section 52.02(b).[3]

What is striking about this case is that the arresting officers, and their supervisor, Officer Miller, did not consider it their responsibility to notify appellant's parents about his arrest. Officer Miller testified as follows:

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[3] The State argues in its brief that the evidence supports the conclusion that appellant's parents were notified, at the earliest, when appellant was taken into custody at 2:45 p.m., based on Sargeant Gillane's testimony that he notified the high school principal of appellant's arrest about 2:45 p.m., and his explanation of school procedures. However, there is no evidence that the school actually notified, or even attempted to notify appellant's parents, and appellant's mother testified that no one from the school notified her. The trial judge found that there was no notice to appellant's family until 8:15 p.m., a finding that precludes our consideration of the State's argument that notice occurred earlier; the evidence supports the trial court's fact finding.

Q: [Prosecutor]: As far as during the time period you had the defendant in your custody there, did you at any time talk with any family member of the defendant as far as where the defendant was and what was going on with the case at that point?

A: [Officer Miller]: No, I didn't.

Q. Subsequent to that did other officers do that?

A. Yes, they did.

Q. And who was that?

A. Officer Parham in the juvenile division contacted the defendant's sister at 8:15. And the Harris County juvenile probation contacted the defendant's father at approximately 9:50.

. . . .

Q: [Defense Counsel]: And I think you testified that you did, not, and I may be wrong; but, you did not contact John Pham's parent, guardian or custodian once John Pham was taken into custody?

A: [Officer Miller]: I did not. It was done by Officer Parham in the juvenile division.

. . . .

Q. Okay. Well, when was John Pham taken into custody?

A. When he was picked up out at the school.

Q. And when did Officer Parham contact or when was Officer Parham alerted as to the arrest of John Pham and the necessity by Officer Parham to

comply with Sec. 52.02 of the Family Code relative to release or delivery to the court?

A. Officer Parham contacted the defendant's sister at 8:15 p.m.

. . . .

Q. And did you talk to Officer Parham yourself?

A. Nope, I did not.

Q. Who did, if you know?

A. Who talked to Officer Parham?

Q. Correct.

A. From our division? I don't understand. I am sure that many people talk to Officer Parham, but pertaining to what?

Q. Well, pertaining to this case who contacted Officer Parham for purpose of alerting him that a juvenile was in custody and that he needed to contact the child's parent, guardian or custodian, if you know?

A. I don't know.

Q. [A]s I understand your testimony the only time or the first time that a person with the juvenile authorities is contacted is when Officer Parham . . . was contacted relative to John Pham at 8:00 o'clock or 8:15 or something along those lines.

A. Basically that would be correct. The defendant was arrested. He made a statement, a voluntary statement. He was transferred to the juvenile division who notified the defendant's family and also notified Harris County Juvenile

> Probation who then, I assume, although I don't know who did it, notified the juvenile courts and it happened within that chronological order generally speaking.

It is obvious from Officer Miller's testimony that he was under the impression the arresting officers had no duty to notify the child's parents upon the child's arrest. Officer Miller, one of the lead investigators in this murder case, apparently believed that the homicide division could hold the juvenile appellant as long as necessary to interrogate him without any notice to appellant's parents – that it was the responsibility of juvenile officers to notify appellant's parents after homicide was finished with the interrogation and after homicide had transported appellant to the Mykawa Road juvenile processing office across town. During the almost six hours that appellant was in the custody of the homicide division officers, no attempt whatsoever was made to contact his parents.

Section 52.02(b) of the Family Code was clearly violated. The duty to notify a child's parents belonged to the "person taking a child into custody," i.e., Officers Hale and Parish, and their supervisor, Office [sic] Miller in this case. It was their responsibility to see to it that notice of appellant's arrest, with a statement of the reason for taking him into custody, was promptly given to appellant's parents and the official designated by the juvenile court. These officers were apparently oblivious to the fact they had such a duty, and they did not perform as required.

The Court of Criminal Appeals explained the rationale behind Title 3 of the Family Code, which includes chapter 52:

> In construing provisions of Title 3 of the Family Code we must be mindful of the sometimes competing purposes it is meant to serve, *viz:* to protect the public from the unlawful acts of children while concomitantly insulating these children from the stigma of criminality and providing for their welfare and edification – and 'to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety. . . .'

Comer, 776 S.W.2d at 193 (quoting Tex.Fam.Code § 51.01). Ten years later, the Court of Criminal Appeals stated in *Le:*

> Today we reaffirm our decision in *Comer.* The Legislature has set forth very specific actions which a law enforcement officer must take when arresting a juvenile. We are aware of the disturbing increase in juvenile crime in our state, and we are sympathetic to law enforcement's efforts to deal with violent juvenile offenders. Nevertheless, we must not ignore the Legislature's mandatory provisions regarding the arrest of juveniles. We informed the citizenry, a decade ago in a unanimous opinion, of the Legislature's clear intent to reduce an officer's impact on a juvenile in custody. Today we remind police officers of the Family Code's strict requirements.

Le, 993 S.W.2d at 655.

In *Comer,* before reversing the case for failing to transport a juvenile "forthwith" to the custody of the juvenile custody facility, the Court of Criminal Appeals conducted a taint attenuation analysis, utilizing the four factors from *Bell v. State,* 724 S.W.2d 780 (Tex.Crim.App.1986). *Comer,*

776 S.W.2d at 196-97. Those factors are: (1) the giving of *Miranda* warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct. *Bell*, 724 S.W.2d at 788. In the present case, *Miranda* warnings were given, as in *Comer* (*Comer*, 776 S.W.2d at 196); the confession came approximately two hours after the violation, as in *Comer* (*id.* at 193); an intervening circumstance is that appellant was taken before a neutral magistrate for warnings, as in *Comer* (*id.* at 193, 196); and the officers did not wilfully violate the law in order to obtain appellant's confession, as in *Comer* (*id.* at 197). The court in *Comer* concluded that the taint of the juvenile's unlawful detention had not dissipated by the time he gave his confession, noting that:

> We cannot say with any degree of confidence that, had appellant been transported 'forthwith' to the custody of the juvenile detention facility, where he may have had access to, if not counsel, at least his parents . . . he would still have chosen to confess his crime.

Comer, 776 S.W.2d at 197.

Family Code section 52.025(c) specifically provides: "A child may not be left unattended in a juvenile processing office and is entitled to be accompanied by the child's parent, guardian, or other custodian or by the child's attorney." Tex.Fam.Code § 52.025(c) (Vernon Supp.2000). If the arresting officers had promptly notified appellant's parents of his arrest approximately two hours before his confession, there would have been time for them to get to the juvenile processing office at 1200 Travis before the

confession.[4] As in *Comer,* we cannot say with any degree of confidence that if appellant had access to his parents or his attorney, he would still have chosen to confess to the crime. Accordingly, appellant's statement should have been suppressed under article 38.23 of the Texas Code of Criminal Procedure. *See also In the Matter of C.R.,* 995 S.W.2d at 782 (holding juvenile's confession inadmissible because of violation of Family Code Section 52.02(b)).

HARM ANALYSIS

Because we find the trial court erred in overruling appellant's motion to suppress, we must now consider whether appellant was harmed by the admission of his oral confession. We apply Texas Rule of Appellate Procedure 44.2(b) to determine whether the trial court's error constitutes reversible error. *See* Tex. R.APP.P. 44.2(b). Non-constitutional error must be disregarded unless it affects substantial rights of the defendant. *Id.* A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State,* 953 S.W.2d 266, 271 (Tex.Crim.App.1997). A conviction should not be overturned for such error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or had but a slight effect. *Johnson v. State,* 967 S.W.2d 410, 417 (Tex.Crim.App.1998).

In the present case, appellant did not testify at the trial. Tien Ha, complainant's brother and a passenger in

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[4] The trial court specifically found that "[t]he entire building at 1200 Travis, including the interview room where Miller and Defendant talked, is designated as a juvenile processing office."

the car in which complainant was shot and killed, is the only witness who was able to identify a shooter. Ha identified another man, Tien Tran, as the individual he saw shooting a gun. Ha also testified that Tien Tran was in a white Honda Accord. The other witnesses testified they could not identify any person in the white Honda because either the car's windows were tinted or the witness had ducked down to avoid being hit by the gunfire. The murder weapon was not introduced at trial, and no one testified that appellant was the shooter.

The evidence, excluding appellant's confession, does not implicate appellant as being someone who shot a gun at the car complainant was driving. We cannot ignore the substantial, dramatic effect the confession must have had on the decision-making process of the jury. Accordingly, we hold that the denial of appellant's motion to suppress constituted reversible error. We sustain appellant's first point of error.

CONCLUSION

Because we have sustained appellant's first point of error, it is not necessary to reach the merits of appellant's remaining points of error, and we decline to do so. We reverse the judgment and remand the cause to the trial court for further proceedings.